IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	12-md-02311 Honorable Marianne O. Battani
In re: All Auto Parts Cases	2:12-cv-02311-MOB-MKM
THIS RELATES TO: ALL AUTO PARTS CASES	

DEFENDANTS' OPPOSITION TO CERTAIN SERVING PARTIES' MOTION TO COMPEL DISCOVERY FROM NON-PARTY ORIGINAL EQUIPMENT MANUFACTURERS

STATEMENT OF THE ISSUE PRESENTED

1. Whether this Court should compel certain original equipment manufacturers (the "SSEs") to produce documents regarding confidential settlement negotiations between the SSEs and Defendants that are protected by the settlement privilege recognized in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003).

Answer: No

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INTRODUCTION

Plaintiffs seek to compel certain original equipment manufacturers (the "SSEs")[1] to produce documents regarding confidential communications that the SSEs and Defendants may have had to try to settle any claims the SSEs may have relating to the conduct at issue in this MDL proceeding. (Mot. 11-15.)[2] This Court should deny Plaintiffs' motion because it seeks documents that the Sixth Circuit has held are privileged.

In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003), the Sixth Circuit established a privilege that protects "all communications made in furtherance of settlement" regardless of whether the communications are "informal[]" or "done under the auspices of the court." *Id.* at 980, 983. The Court held that strong public policy favors the privilege because settlement negotiations are ineffective unless they are kept confidential. Additionally, the Court concluded that communications made during settlement negotiations are categorically unreliable and thus have little probative value in subsequent litigation.

Documents concerning settlement communications between Defendants and the SSEs lie at the heart of this privilege. Nevertheless, Plaintiffs argue that the documents are not privileged because the SSEs had not sued Defendants at the time of the alleged communications, the SSEs have not shown that the communications are unreliable, and the public interest supports disregarding the privilege here. (Mot. 14-15.) These arguments are meritless. *Goodyear's* settlement privilege applies to documents concerning "*all* communications made in furtherance of settlement," regardless of whether they are "informal" pre-suit settlement discussions or

[1] "SSEs" stands for "Specified Subpoena Entities" and refers to the particular OEMs that have jointly negotiated with the parties that served the subpoena over its scope and who are subject to Plaintiffs' motion to compel.

[2] Citations to "Mot." are to Plaintiffs' brief in support of their motion to compel (Dkt. No. 1188) which is the subject of this Opposition. "Plaintiffs" refers only to those plaintiffs that filed the motion to compel (Automobile Dealer Plaintiffs, End-Payor Plaintiffs, Truck and Equipment Dealer Plaintiffs, the State of Florida, and the State of Indiana).

between parties in active litigation; there is no requirement that the party invoking the privilege show that each individual communication is unreliable; and *Goodyear* makes clear that the public interest requires applying the privilege to all settlement communications across-the-board. *Goodyear*, 332 F.3d at 980-83 (emphasis added).

BACKGROUND

In July and August 2015, the plaintiffs and defendants in the MDL jointly issued subpoenas to the SSEs (and other OEMs), primarily seeking sales and cost information from each of them relating to their acquisition of the parts at issue in this MDL. (*See generally* Ex. 1.) Each of those subpoenas included Request 31, which seeks from the SSEs "[a]ll Documents relating to Your or other OEMs' negotiations or Communications with any of the Defendants or other Components or Assemblies suppliers in connection with Defendants' and other Components or Assemblies suppliers' conduct at issue in MDL No. 2311 and Documents Defendants or other Components or Assemblies suppliers provided to You or other OEMs, in connection with the facts described in any Plaintiffs' Complaints." (Ex. 1 at 34.)

Although the parties jointly issued the subpoenas, Defendants did "not join in Request No. 31." (*See* Ex. 2, 7/16/15 Subpoena Cover Letter to SSEs.) Both the SSEs and Defendants subsequently objected to that request on settlement privilege grounds. (*See* Ex. 3, 12/18/15 Letter from C. Kass to S. Klein, at 13; Ex. 4, 10/14/15 Letter from R. Spiegel to C. Kass, at 1 ("[d]efendants specifically object to the production of any documents in response to Request No. 31, as it seeks documents that would violate the settlement-communications privilege recognized in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003) and *Allen Cnty. v. Reilly Indus.*, 197 F.R.D. 352, 354 (N.D. Ohio 2000)"); Ex. 5, 11/24/15 Letter from S. Klein to C. Kass, at 5 n.8 ("Defendants object to Request 31 on the ground that it seeks

documents which Defendants believe are protected by the settlement-communications privilege.").)

ARGUMENT

I. The Settlement Privilege Protects Documents Concerning Settlement Communications Between Defendants And The SSEs.

A. The Documents Plaintiffs Seek Are Covered By The Settlement Privilege.

In *Goodyear*, the Sixth Circuit established a settlement privilege, recognizing that there is a "strong public interest" in settling disputes and "in order for settlement talks to be effective, parties must feel uninhibited in their communications." *Goodyear*, 332 F.3d at 980. The Court also reasoned that settlement communications have little probative value given the "inherent questionability of the truthfulness of any statements made therein" because those statements "may be motivated by a desire for peace rather than from any concession of weakness of position." *Id.* at 981, 983 (quoting, among others, *United States v. Contra Costa Cty. Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982)). Accordingly, the Court held that "any communication made in furtherance of settlement" are privileged, regardless of whether the communication was "informal[]" or "done under the auspices of the court." *Id.* at 980, 983.[3]

Here, *Goodyear* controls and mandates that "any communications" between the SSEs and Defendants "made in furtherance of settlement" not be produced. *Id.* at 983. Therefore, to the extent Request 31 seeks documents reflecting settlement communications, Plaintiffs' motion to compel should be denied. *See id.*

[3] Because the privilege belongs to both parties in the settlement negotiations, either party may unilaterally invoke the privilege to prevent disclosure of privileged information. *See, e.g.*, *Anderson v. Clarksville Montgomery Cty. Sch. Bd. & Sch. Dist.*, 229 F.R.D. 546, 547 (M.D. Tenn. 2005) ("when parties jointly are holders of the same privilege, neither of them may unilaterally waive the privilege for the other with respect to third parties over the others' objection."). Defendants therefore have the right to object to Request No. 31, even though it is only directed at the SSEs.

Plaintiffs are incorrect in arguing that Defendants, in response to Plaintiffs' document requests, "have agreed" to produce settlement communications between Defendants and OEMs. (Mot. 12.) At all times, Defendants have refused to produce privileged settlement communications, and in the very email Plaintiffs attach to their motion, the relevant Defendants made clear that they would only produce *non-privileged* communications, if they existed. (Ex. 6, 7/2/14 Letter from A. Maltas to V. Romanenko, at 1; Ex. 7, 7/14/14 Email from D. Donovan to V. Romanenko; *see* Mot. 12.)

Plaintiffs' claim that they need to seek these materials from the SSEs is irrelevant and unsupported. (*See* Mot. 12-13.) Plaintiffs' supposed need is irrelevant because "the very nature of a privilege is that it prevents disclosure of information that may be relevant in the case, in order to serve interests that are of over-arching importance." *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 530 (N.D. Ill. 1999). Further, Plaintiffs have already sought these same documents by propounding a document request relating to "negotiations and communications" with OEMs: "All Documents related to your or other Defendants' negotiations or communications with any OEMs in connection with the facts described in Dealership Plaintiffs' Complaint and Documents you or any other Defendant provided to OEMs or other customers, in connection with the facts described in Dealership Plaintiffs' Complaint." (Ex. 8, Dealership Plaintiffs' First Request for Production of Documents Directed to All Defendants, at 3 (Request No. 11).) Because the privilege covers only documents *created in furtherance of* settlement, and *not* documents merely exchanged during settlement communications, it does not protect certain other documents (*i.e.*, pre-existing business documents) that are responsive to Plaintiffs' other non-objectionable discovery requests issued to certain Defendants. *See Grupo Condumex, S.A. de C.V. v. SPX*

Corp., 331 F. Supp. 2d 623, 629 (N.D. Ohio 2004).[4] The only reason for Plaintiffs to seek documents from the SSEs pursuant to Request 31 is to attempt to interject themselves into past, ongoing, and future settlement discussions, by obtaining *other kinds* of documents about the conduct at issue that Defendants properly have refused to produce on privilege grounds. Plaintiffs' motion thus strikes at the heart of the privilege.

B. Plaintiffs' Attempts To Circumvent The Privilege Fail.

Plaintiffs offer three arguments that the documents regarding settlement communications that they seek are not covered by the privilege recognized in *Goodyear*. Each fails.

i. *Goodyear* Holds That The Public Interest Favors The Confidentiality Of *All* Settlement Communications.

Plaintiffs misconstrue *Goodyear* and argue that the application of a settlement privilege must be "weighed against the public interest" on a "case-by-case basis" for each settlement communication. (Mot. 13.) That is not so. In *Goodyear*, the Court of Appeals used the phrase "case-by-case basis" when *it* (the Court of Appeals) was determining whether it should create a *categorical* settlement privilege. *Goodyear*, 332 F.3d at 980. The Court did not impose on district courts the impossible task of examining the public interest on a document-by-document basis. *Id.* The only relevant question is whether a document reflects communications made for the purpose of furthering settlement discussions. If so, the document is privileged.

But even if district courts were supposed to evaluate individual settlement communications on a case-by-case basis—which they are not—the public interest here still favors non-disclosure. Any settlements that Defendants or other suppliers have reached with the

[4] To the extent any of these documents relate to products not at issue in the MDL or relate to products subject to a current case but as to which DOJ has a continued objection to discovery moving forward (automobile hoses, brake hoses, and shock absorbers), those documents would be among the materials DOJ has continued to object to any entity, including the SSEs, producing.

SSEs have conserved judicial resources. *See id.* (there is a "strong public interest" in settling disputes). Some Defendants may have already settled confidentially with some SSEs, but many certainly have not. If this Court were to allow discovery of settlement communications, those Defendants would be discouraged from settling with any other OEMs, burdening the courts with further litigation. And the deleterious effect on settlement would not be limited to this MDL: allowing courts to essentially revoke the settlement privilege after-the-fact would dissuade all parties in this Circuit from engaging in the kind of frank discussions necessary to settle cases. Indeed, Plaintiffs themselves have recognized the importance of confidentiality of settlements by including confidentiality provisions in their settlement agreements with Defendants to date. (*See, e.g.*, Ex. 9, Hitachi Automotive Systems, Ltd. Automobile Dealership Settlement Agreement, ¶ 45 ("[Hitachi] and Automobile Dealership Plaintiffs agreement not to disclose publicly or to any other person, except for Releasees where necessary, the terms of this Agreement until this Agreement is submitted to the Court for Preliminary Approval.").)

ii. There Is No "Pending Case" Requirement.

Plaintiffs argue that the SSEs and Defendants cannot assert a settlement privilege over the communications because the OEMs "never even filed a case." (Mot. 14.) There is no requirement that a case be pending for the privilege to apply. As the Northern District of Ohio concluded in rejecting the argument that a pending case is necessary, such a requirement conflicts "with explicit language in *Goodyear*" stating that the settlement privilege applies "'whether settlement negotiations are done under the auspices of the court or informally between the parties.'" *Snap-On Business Solutions, Inc. v. Hyundai Motor Am.*, No. 5:07-CV-1961, 2011 WL 6957594, at *1 n. 2 (N.D. Ohio Feb. 3, 2011) (quoting *Goodyear*, 332 F.3d at 980). At least two other courts in the Sixth Circuit have similarly suggested that there is no need for an existing case for the privilege to apply to documents reflecting settlement communications. *See Konyn v.*

Lake Superior & Ishpeming R.R. Co., No. 2:11-cv-51, 2015 WL 10276153, at *1 (W.D. Mich. Feb. 3, 2012) (citing *Goodyear* to hold that "[c]onversations between plaintiff or plaintiff's counsel and [a non-party] regarding negotiation of a settlement of claims plaintiff *may have* against [the non-party] are protected from disclosure"); *BioLumix Inc. v. Centrus Int'l Inc.*, No. 08-11418, 2013 U.S. Dist. LEXIS 162002 (E.D. Mich. Nov. 14, 2013) ("Communications made in furtherance of settlement are privileged….*There is no requirement that the privileged communication be between adverse parties*.") (emphases added). Requiring a pre-existing case would defeat *Goodyear*'s goal of avoiding disputes in the first place, since parties could not engage in confidential settlement discussions until after litigation had *already* commenced. *See Goodyear*, 332 F.3d at 980-81.

Plaintiffs cite a single district court case in support of their argument, but it does not support a "pending case" requirement. (Mot. 14 (citing *State v. Little River Band of Ottawa Indians*, No. 5:05-cv-95, 2007 WL 851282, at *2 (W.D. Mich. March 16, 2007).) The letter at issue in that case was not privileged because it was not kept confidential, it notified the recipient of an action already taken, and it represented an outright refusal to act that bore no indicia that it was part of settlement negotiations. *Id.* at *2-*3. To the extent *Little River Band* required an existing case, it is inconsistent with *Goodyear* and the majority of district courts that have addressed this issue.

iii. There Is No Requirement That Courts Must Assess The Reliability Of Individual Settlement Communications.

Plaintiffs also argue that settlement communications between the OEMs and Defendants should not be privileged because there has been no showing that they are "inherently unreliable." (Mot. 15 (citing *Grupo Condumex*, 331 F. Supp. 2d at 629.) But *Goodyear* does not require the parties to show that each individual communication is unreliable to invoke the privilege (an

impossible task without revealing the substance of the communication, anyway). The Court of Appeals merely cited the inherent unreliability of settlement communications *as a class* as one of the reasons, in addition to the policy favoring confidential negotiations, for the creation of a settlement privilege. *Goodyear*, 332 F.3d at 981 ("The public policy favoring secret negotiations, combined with the *inherent* questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist….") (emphasis added).

CONCLUSION

As set forth above, Plaintiffs' motion to compel discovery from the SSEs should be denied to the extent it seeks documents relating to communications between the SSEs and Defendants to further their settlement discussions, which are protected by the settlement privilege.

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2016, I caused a copy of DEFENDANTS' OPPOSITION TO CERTAIN SERVING PARTIES' MOTION TO COMPEL DISCOVERY FROM NON-PARTY ORIGINAL EQUIPMENT MANUFACTURERS COMPLAINT to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notifications of such filings to all counsel of record.

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